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No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1958

SARAH B. DANNING, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF SAMUEL N. SHERMAN, d.b.a. SOUTHERN CALIFORNIA COLLEGE OF BUSINESS, BANKRUPT, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	13

CITATIONS

Cases:

Alexander v. *Hillman*, 296 U.S. 222	8
Bowman v. *Loperena*, 311 U.S. 262	12
Chase National Bank v. *Lyford*, 147 F. 2d 273	8
Columbia Foundry v. *Lochner*, 179 F. 2d 630	8
Conboy v. *First Nat. Bk. of Jersey City*, 203 U.S. 141	12
Conway v. *Union Bank of Switzerland*, 204 F. 2d 603, certiorari dismissed, *sub nom. Silesian Holding Co.* v. *Union Bank of Switzerland*, 350 U.S. 978	8
De Groot v. *United States*, 5 Wall. 419	5
Eastern Transportation Co. v. *United States*, 272 U.S. 675	8
F.T.C. v. *Minneapolis-Honeywell Co.*, 344 U.S. 206	12
Florance v. *Kresge*, 93 F. 2d 781	8
Floro Realty & Investment Co. v. *Steem Electric Corp.*, 128 F. 2d 338	8
Greenstreet, Inc., In re, 209 F. 2d 660	10
Guarantee Co. v. *Title Guaranty Co.*, 224 U.S. 152	9
Inter-State National Bank of Kansas City v. *Luther*, 221 F. 2d 382, certiorari dismissed, 350 U.S. 944	8
Lewis v. *United States*, 92 U.S. 618	9
Majestic Radio & Television Corp., In re, 227 F. 2d 152, certiorari denied, *sub nom. Dwyer et al., Trustees*, v. *Franklin*, 350 U.S. 995	8

Cases—Continued — Page

Marden v. *Campbell Printing-Press & Mfg. Co.*, 67 Fed. 809 — 11
Menist, In re, 294 Fed. 532 — 9
Monongahela Rye Liquors, In re, 141 F. 2d 864 — 10
Nassau Smelting Works v. *United States*, 266 U.S. 101 — 5
Nathan, In re, 98 F. Supp. 686 — 8
Nealon v. *Hill*, 149 F. 2d 883, certiorari denied, 326 U.S. 753 — 11
Pfister v. *Finance Corp.*, 317 U.S. 144 — 12
Reeside v. *Walker*, 11 How. 272 — 5
Safeway Stores, Inc. v. *Coe*, 136 F. 2d 771 — 11
Sampsell v. *United States*, 205 F. 2d 490 — 9
Solar Manufacturing Corporation, In re, 200 F. 2d 327, certiorari denied, *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U.S. 940 — 8
Soriano v. *United States*, 352 U.S. 270 — 8
United States v. *Birmingham Trust & Savings Co.*, 258 Fed. 562, certiorari denied, 251 U.S. 550 — 9
United States v. *Eckford*, 6 Wall. 484 — 5
United States v. *Herron*, 20 Wall. 251 — 9
United States v. *Roth*, 164 F. 2d 575 — 10
United States v. *Shaw*, 309 U.S. 495 — 5, 6, 7, 9
United States v. *Sherwood*, 312 U.S. 584 — 8
United States v. *United Mine Workers*, 330 U.S. 258 — 9
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 — 5, 6, 7, 9, 10
United States v. *Wittek*, 337 U.S. 346 — 9
Villere v. *United States*, 18 F. 2d 409, certiorari denied, 275 U.S. 532 — 9
Ward, In re, 131 F. Supp. 387 — 10

Statutes:

Bankruptcy Act, former Section 77B, as added by the Act of June 7, 1934, 48 Stat. 911, 921, 922 — 6
Bankruptcy Act, 52 Stat. 840, *et seq.*, as amended:
Section 57(n), 11 U.S.C. 93(n) — 9
Section 68(a), 11 U.S.C. 108(a) — 2, 7, 8

Miscellaneous:

Page

Robertson and Kirkham. *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurkland ed.), pp. 768-773, 826 ..... 11, 12

Rule 23, Rules of the United States Court of Appeals for the Ninth Circuit 2, 5, 11

Stern and Gressman, *Supreme Court Practice* (2d ed.), pp. 163-165 11

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum-opinion of the referee in bankruptcy (R. 25-36) is unreported. The district court wrote no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-13) is reported at 259 F. 2d 305.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 14) was entered on August 28, 1958. Time to petition the Court of Appeals for a rehearing expired on

September 27, 1958 (see Rule 23, Rules of the United States Court of Appeals for the Ninth Circuit). The time to petition this Court for a writ of certiorari expired on November 26, 1958. On December 2, 1958, petitioner filed an application with the Court of Appeals for leave to file a petition for rehearing and reconsideration out of time (R. 81-86). On December 8, 1958, the Court of Appeals for the Ninth Circuit granted petitioner's application to file a petition for rehearing and reconsideration (R. 98). The following day, December 9, 1958, the petition for rehearing was denied (R. 108). The petition for certiorari was filed on January 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Whether a bankruptcy court has summary jurisdiction to award an affirmative judgment against the United States on a counterclaim.

2. Whether, once the time to petition for certiorari has expired, this Court is revested with jurisdiction by a court of appeals order granting a subsequent application for leave to file a petition for rehearing out of time when the petition for rehearing itself is subsequently denied.

STATUTE INVOLVED

Section 68(a) of the Bankruptcy Act, 52 Stat. 878, 11 U.S.C. 108(a) provides as follows:

> (a.) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a

creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

STATEMENT

Petitioner, a trustee in bankruptcy, here seeks review of an order of a referee in bankruptcy dismissing the trustee's affirmative counterclaim against the United States for lack of jurisdiction. The referee's order was affirmed both by the district court and by the Court of Appeals.

Following an adjudication of bankruptcy on an involuntary petition filed by the bankrupt's creditors, the United States filed a preliminary proof of claim against the bankrupt's estate in the amount of $322,861.09, (R. 11-15). A later proof of claim filed by the United States increased the amount to $834,631.18 (R. 16-18). This claim was based on the bankrupt's submission of, and payment by the United States on, fraudulent vouchers for allegedly furnishing education and training to eligible veterans (R. 12-13). The trustee filed preliminary objections to the allowance of the Government's claim and, in addition, filed a counterclaim in an unspecified amount for sums due under contracts between the bankrupt and the Government for the education and training of veterans (R. 19-23).

After prolonged negotiations, the parties were unable to arrive at a settlement of their respective ob[illegible]tions (R. 27). The Government thereupon n[illegible]d to withdraw its claim and to dismiss the trustee's counterclaim (R. 24-25) in order that the matter might be settled in a single litigation in the

Court of Claims, at which time the Government could present its claim as a defense to the suit. The referee, after briefs and argument, concluded that the bankruptcy court did not have jurisdiction to render affirmative relief against the United States (R. 25-36). Accordingly, it granted the Government's motion allowing it to withdraw its claim and, since any recovery by the trustee would then amount to affirmative relief against the Government, dismissed the counterclaim for lack of jurisdiction (R. 37-38). Against a background of complete sovereign immunity, the referee was unable to find in the Bankruptcy Act a waiver of this immunity, either express or implied, as concerns an affirmative counterclaim by a trustee in bankruptcy. On review of the referee's order by the district court, sitting as a court of bankruptcy, that court affirmed without opinion (R. 50-51). On appeal to the Court of Appeals for the Ninth Circuit, that court too affirmed:

> Failing to find a specific statutory waiver, and having no power to find one by implication or interpretation, we are bound by a long line of cases to hold that an affirmative judgment against the United States cannot be entered on a counterclaim without specific statutory authorization for affirmative relief against the government on the counterclaim as such. [259 F. 2d 305, 309-310.]

* * * *

The judgment of the Court of Appeals was filed on August 28, 1958 (Pet. App. 14). Thereafter, petitioner applied for a stay of mandate because of her intention to file a petition for a writ of certiorari in

this Court (R. 87). An order staying the issuance of the mandate until November 27, 1958, was issued by the Court of Appeals on October 23, 1958 (R. 87). One day after the time to petition for certiorari had expired, two separate petitions were received by the Clerk of this Court (R. 88). Following telephonic and telegraphic communications between the Clerk and counsel for petitioner, the Clerk was instructed not to docket the case (R. 88). Thereafter, on December 2, 1958, petitioner moved the Court of Appeals for leave to file a petition for rehearing and reconsideration out of time [1] (R. 81-86). On December 8, 1958, the Court of Appeals granted petitioner's application for leave to file a petition for rehearing (R. 98) and on the following day denied the petition for rehearing (R. 108).

ARGUMENT

1. It is well settled that the sovereign's traditional immunity from suit prevents the award of an affirmative judgment against it on a counterclaim, unless there is specific statutory consent thereto. *United States* v. *Shaw*, 309 U.S. 495; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506; *Nassau Smelting Works* v. *United States*, 266 U.S. 101; *United States* v. *Eckford*, 6 Wall. 484; *Reeside* v. *Walker*, 11 How. 272; see *De Groot* v. *United States*, 5 Wall. 419, 431. The narrow question presented by this petition is whether the necessary specific statu-

[1] Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit allows thirty days after judgment in which to file a petition for rehearing.

tory consent to such an award exists in this case; that is, whether the Bankruptcy Act contains specific language conferring summary jurisdiction on the bankruptcy court to award an affirmative judgment against the United States on a counterclaim.

At the outset, petitioner is faced with the holding of this Court in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506.[2] That case ruled that an affirmative judgment against the United States rendered on a counterclaim in a bankruptcy reorganization proceeding was void because the bankruptcy court lacked jurisdiction to award affirmative relief against the sovereign.[3] In an earlier bankruptcy reorganization proceeding, the Government's claim against the debtor had been allowed in the amount of $2,000, but the debtor's counterclaim had been allowed for over $11,000, and the bankruptcy court had awarded a judgment against the United States for the difference. When this judgment was later brought in issue in a subsequent suit, this Court held the judgment void because the bankruptcy court was without jurisdiction to award affirmative relief against the United States in these

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[2] See also the companion case, *United States* v. *Shaw*, 309 U.S. 495.

[3] The general provisions of the Bankruptcy Act were fully applicable to reorganization proceedings under former Section 77B, except insofar as inconsistent with that Section. See Section 77B(k), 48 Stat. 921, and Section 77B(o), 48 Stat. 922. The petitioner has made no claim here or in the courts below that the case can be distinguished on the ground that it was a bankruptcy reorganization proceeding rather than straight bankruptcy.

circumstances: "No statutory authority granted jurisdiction to the Missouri [bankruptcy] court to adjudicate a cross-claim against the United States." *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. at 512.

In an attempt to avoid the effect of this decision, petitioner argues that this result has now been changed by the 1938 amendments to the Bankruptcy Act, known as the Chandler Act (52 Stat. 840). Although petitioner frequently reiterates this contention (Pet. 12, 13-14, 16), nowhere does she call the Court's attention to specific language in the Chandler Act amendments which allegedly accomplishes this result. Section 68(a) of the Bankruptcy Act, which appears to be the sole section on which petitioner relies, was in force *in haec verba* prior to the Chandler Act amendments and at the time of this Court's decision in the *United States Fidelity & Guaranty* case.

Moreover, the language of Section 68(a) can hardly be said to contain a specific grant of jurisdiction to a bankruptcy court to render an affirmative judgment on a counterclaim against the United States. It provides as follows (11 U.S.C. 108(a)):

> In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

As noted above, "without *specific* statutory consent, no suit may be brought against the United States." *United States* v. *Shaw*, 309 U.S. 495, 500-501. (Em-

phasis supplied.) As this Court stated in *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686, "The sovereignty of the United States raises a presumption against its suability, unless it is *clearly* shown". (Emphasis supplied.) "Limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied", *Soriano* v. *United States*, 352 U.S. 270, 276. See also, *United States* v. *Sherwood*, 312 U.S. 584, 590-591, and cases there cited. With these principles of construction relating to waivers of sovereign immunity in mind, it hardly seems open to doubt that Section 68(a) contains no waiver of sovereign immunity.

Finally, whatever effect Section 68(a) has with respect to the award of an affirmative judgment on a counterclaim against a private party,[4] it cannot

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[4] While a majority of courts have sanctioned the entry of an affirmative judgment on a counterclaim against a private party, these decisions have been based, not on Section 68(a), but on the consent to jurisdiction of the counterclaim implied in the filing of the claim. *In re Majestic Radio & Television Corp.*, 227 F. 2d 152 (C.A. 7), certiorari denied, *sub nom. Dwyer et al., Trustees*, v. *Franklin*, 350 U.S. 995; *Inter-State National Bank of Kansas City* v. *Luther*, 221 F. 2d 382 (C.A. 10), certiorari dismissed, 350 U.S. 944; *Conway* v. *Union Bank of Switzerland*, 204 F. 2d 603 (C.A. 2), certiorari dismissed, *sub nom. Silesian Holding Co.* v. *Union Bank of Switzerland*, 350 U.S. 978; *In re Solar Manufacturing Corporation*, 200 F. 2d 327 (C.A. 3), certiorari denied, *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U.S. 940; *Columbia Foundry* v. *Lochner*, 179 F. 2d 630 (C.A. 4); *Chase National Bank* v. *Lyford*, 147 F. 2d 273 (C.A. 2); *Floro Realty & Investment Co.* v. *Steem Electric Corp.*, 128 F. 2d 338 (C.A. 8); *Florance* v. *Kresge*, 93 F. 2d 784 (C.A. 4); *In re Nathan*, 98 F. Supp. 686 (S.D. Calif.). See also *Alexander* v. *Hillman*, 296 U.S.

apply to the Government, since it has frequently been held that a general provision of the Bankruptcy Act does not apply to the United States unless it is specifically mentioned in that provision.[5] *Guarantee Co.* v. *Title Guaranty Co.*, 224 U.S. 152, 155; *Lewis* v. *United States*, 92 U.S. 618, 622; *United States* v. *Herron*, 20 Wall. 251, 260-264. Thus, for example, until Congress made time limitations for filing claims specifically applicable to the United States,[6] failure to file timely did not preclude the Government's claim. *Villere* v. *United States*, 18 F. 2d 409 (C.A. 5), certiorari denied, 275 U.S. 532; *In re Menist*, 294 Fed. 532 (C.A. 2); *United States* v. *Birmingham Trust & Savings Co.*, 258 Fed. 562 (C.A. 5), cer-

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222. Petitioner's attempt to apply this argument to the United States (R. 20-22) may be dealt with shortly, since it was answered in this Court's decision in *United States* v. *Shaw*, 309 U.S. 495, 500-501:

> Whether * * * jurisdiction exists depends upon the effect of the voluntary submission to the Michigan court by the United States of its claim against the estate. As a foundation for the examination of that question we may lay the postulate that without specific *statutory* consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction. [Emphasis supplied.]

See also *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513.

[5] This is no more than an application of the general principle that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. See, *e.g.*, *United States* v. *Wittek*, 337 U.S. 346, 359; *United States* v. *United Mine Workers*, 330 U.S. 258, 272.

[6] See Section 57(n) of the Bankruptcy Act, 11 U.S.C. 93(n).

tiorari denied, 251 U.S. 550. For a continuing application of this principle after the Chandler Act, see *Sampsell* v. *United States*, 205 F. 2d 490 (C.A. 9).

The only other appellate consideration since the Chandler Act of the jurisdiction of a court of bankruptcy to award an affirmative judgment against the United States on a counterclaim is in complete accord with the decision of the Court of Appeals in the instant case. *In re Greenstreet, Inc.*, 209 F. 2d 660 (C.A. 7); see also *In re Monongahela Rye Liquors*, 141 F. 2d 864 (C.A. 3).[7]

Contrary to petitioner's assertion, the decision of the Second Circuit in *United States* v. *Roth*, 164 F. 2d 575, is not in conflict with the instant case. The *Roth* case decided only that the bankruptcy court had jurisdiction to entertain a defensive counterclaim against the United States to the extent of its claim, a contention which we do not dispute here. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506. Indeed, the court in *Roth* specifically noted that "[w]hether the bankruptcy court could enter an affirmative judgment against the United States, if the bankrupt's counterclaim had exceeded the Government's claim, is not presented by this record and need not be considered." (164 F. 2d at 578, n. 7).

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[7] *In re Ward*, 131 F. Supp. 387 (D. Colo.), a district court decision adopting the referee's opinion, appears to conflict with the instant case and with the *Greenstreet* case; Moreover, the conclusion in the *Ward* case that "the United States could consent to the summary jurisdiction of the Referee and that by its conduct it waived any right of objection" (131 F. Supp. at 397) seems plainly wrong. See footnote 4, *supra*, pp. 8-9.

2. There is some doubt whether this petition for certiorari has been timely filed. After both the time for filing a petition for rehearing in the Court of Appeals[8] and the time for filing a petition for certiorari in this Court had expired, petitioner filed a motion in the Court of Appeals for leave to file a petition for rehearing out of time (R. 81-86). This motion for leave to file was granted on December 8, 1958, and the rehearing itself was promptly denied the next day. The precise question as to whether the time within which to file a petition for certiorari, once having expired, may be revived by a court of appeals order granting leave to file an untimely petition for rehearing has apparently never been passed on by this Court. Stern and Gressman, *Supreme Court Practice* (2d ed.), pp. 163-165; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.), pp. 768-773, 826.

Analogous cases in courts of appeals suggest that the Ninth Circuit's action here cannot have the effect of reviving the time limit on a petition for certiorari. As stated by the Court of Appeals for the District of Columbia Circuit, "a party may not avoid the effect of a mandatory rule or statute limiting the time [to appeal] by filing late a motion for rehearing, even where the motion is considered on its merits." *Safeway Stores, Inc.* v. *Coe*, 136 F. 2d 771, 775 (C.A.D.C.). See also *Nealon* v. *Hill*, 149 F. 2d 883 (C.A. 9), certiorari denied, 326 U.S. 753; *Marden* v. *Campbell Printing-Press & Mfg. Co.*, 67 Fed. 809

[8] See Rule 23, Rules for the United States Court of Appeals for the Ninth Circuit.

(C.A. 1). It has also been held that a petition for rehearing in a court of appeals must be filed before the time to take the case to this Court expires. *Conboy* v. *First Nat. Bk. of Jersey City*, 203 U.S. 141, 145.[9]

On the other hand, this Court has stated in *Bowman* v. *Loperena*, 311 U.S. 262, 266, that:

> The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

See *Pfister* v. *Finance Corp.*, 317 U.S. 144. Cf. *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-213.

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[9] *Conboy* v. *First Nat. Bk. of Jersey City*, *supra*, may have been overruled. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, *supra*, pp. 770-771.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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